

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALBERTO F. OTERO	:	DETERMINATION
	:	DTA NO. 816520
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Periods June 1, 1992 through November 30, 1992, March	:	
1, 1993 through August 31, 1993 and September 1, 1994	:	
through August 31, 1996.	:	

Petitioner, Alberto F. Otero, c/o Nadine Kissel, P.O. Box 104, 7 Halsey Lane, Remsenburg, New York 11960, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1992 through November 30, 1992, March 1, 1993 through August 31, 1993 and September 1, 1994 through August 31, 1996.

On March 31, 1999 and April 2, 1999, respectively, petitioner by his representative, Cyril M. Bezkorowajny, CPA, and the Division of Taxation by Terrence M. Boyle, Esq. (Christina Seifert, Esq. of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by July 22, 1999, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed his request for a conciliation conference with the Bureau of Conciliation and Mediation Services after the issuance of notices of determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Alberto F. Otero, four notices of determination dated May 12, 1995 which were addressed to petitioner at “PO BOX 104 HALSEY LN, REMSENBURGH, NY 11960-0104.” The notices stated that petitioner was being assessed as an officer or responsible person of Al Pesto, Inc. in accordance with Tax Law §§ 1138(a)(1), 1131(1) and 1133. The periods at issue, assessment identification numbers and the amounts due after the crediting of certain payments made are as follows:

Quarter Ended	Assessment ID #	Amount Due
8/31/92	L-010344771-5	\$6,174.00
11/30/92	L-010344770-6	\$2,430.34
5/31/93	L-010344768-7	\$1,817.80
8/31/93	L-010344767-8	\$4,347.98

Penalties and interest were assessed on each of the notices of determination issued to petitioner.

2. The Division issued to petitioner eight additional notices of determination dated May 19, 1997 which were addressed to petitioner at “PO BOX 104 HALSEY LN, REMSENBURG, NY 11960-0104.” The notices stated that petitioner was being assessed as an officer or responsible person of Navona East, Inc. in accordance with Tax Law §§ 1138(a)(1), 1131(1) and 1133. The periods at issue, assessment identification numbers and the amounts due after the crediting of certain payments made are as follows:

Quarter Ended	Assessment ID #	Amount of Tax Due
11/30/94	L-013535225-9	\$10,586.11
2/28/95	L-013535224-1	\$1,282.20
5/31/95	L-013535223-2	\$1,817.62
8/31/95	L-013535222-3	\$15,206.08
11/30/95	L-013535221-4	\$7,059.80
2/29/96	L-013535220-5	\$10,321.11
5/31/96	L-013535219-5	\$7,821.62
8/31/96	L-013535218-6	\$7,151.79

Penalties and interest were assessed on each of the notices of determination issued to petitioner.

3. Petitioner filed a request for a conciliation conference seeking review of the notices of determination of sales and use taxes dated May 12, 1995 and May 19, 1997. The request appears to bear the signature of petitioner and is dated December 15, 1997. The request and attached documents were delivered to the United States Postal Service on December 15, 1997 and were received by the Bureau of Conciliation and Mediation Services ("BCMS") on December 16, 1997.

4. On February 13, 1998, BCMS issued to petitioner a conciliation order denying his request for a conciliation conference. The conciliation order reasoned, in part, that "[t]he Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on May 12, 1997 [sic] [and] May 19, 1997. . . , but the request was not received until December 16, 1997, or in excess of 90 days, the request is late filed."

5. In support of its position, the Division submitted affidavits from three Division employees, Geraldine Mahon, James Baisley and Leonard Finke, explaining the Division's mailing procedures with respect to notices of determination; copies of certified mail records

("CMR"); copies of the notices of determination which were sent to petitioner; a copy of a computer printout summarizing petitioner's 1994 personal income tax return; a copy of petitioner's 1995 New York State Resident Income Tax Return; and a copy of a computer printout summarizing petitioner's 1996 Application for Automatic Extension of Time to File for Individuals.

6. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavits, Ms. Mahon described the Division's general procedure for processing notices of determination prior to shipment to the Division's mechanical unit for mailing.

She explained how she receives a computer printout or CMR and the corresponding statutory notices, each predated with the anticipated date of mailing and each assigned a certified control number. The CMR for the block of notices issued on May 16, 1995, including the notices issued to petitioner bearing the date of May 12, 1995, consisted of 37 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service ("USPS"). The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on May 16, 1995, including the notices issued to petitioner bearing the date of May 12, 1995, bears certified control numbers which run consecutively (P 911 002 292 through P 911 002 690). Each page contains 11 entries, with the exception of the last page which contains 3 entries, for a total of 399 entries.

In the upper left corner of page 1 of the CMR, the date "5/03/95" was manually changed to "5-16-95." The original date of "5/03/95" was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date

of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from "5/03/95" to "5-16-95" was made by personnel in the Division's Mail Processing Section. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative signed or initialed pages 1, 2 and 37 of the CMR, affixed a postmark to each page of the CMR and circled "399" to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Page 21 of the CMR indicates that notices of determination, with notice numbers L-010344767, L-010344768, L-010344770 and L-010344771 were sent to "OTERO-ALBERTO F, PO BOX 104 HALSEY LN, REMSENBURGH, NY 11960-0104," by certified mail using control numbers P 911 002 518, P 911 002 519, P 911 002 521 and P 911 002 522. A U.S. postmark on each page of the CMR confirms that the notices of determination were sent on May 16, 1995.

A review of the notices of determination dated May 12, 1995 and mailed to petitioner on May 16, 1995 indicates that the documents bear assessment identification numbers of L-010344767, L-010344768, L-010344770 and L-010344772 and the certified control numbers P 911 002 518, P 911 002 519, P 911 002 521 and P 911 002 522. The foregoing numbers are

identical to the assessment identification and certified control numbers that appear next to the entries for “OTERO-ALBERTO F” on the May 16, 1995 CMR.

7. Ms. Mahon further explained in a second affidavit that the CMR for the block of notices issued on May 19, 1997, including the notices issued to petitioner, consisted of 18 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service (“USPS”). The pages remain connected when the CMR is returned to Ms. Mahon’s office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on May 19, 1997, including the notices issued to petitioner, bears certified control numbers which run consecutively (P 911 204 992 through P 911 205 183). Each page contains 11 entries, with the exception of the last page which contains 5 entries, for a total of 192 entries.

In the upper left corner of page 1 of the CMR, the date “5/08/97” was manually changed to “5/19/97.” The original date of “5/08/97” was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division’s Mechanical Section. The handwritten change of the date from “5/08/97” to “5/19/97” was made by personnel in the Division’s Mail Processing Section. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS

representative signed or initialed pages 1, 2 and 18 of the CMR, affixed a postmark to each page of the CMR and circled "192" to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Pages 12 and 13 of the CMR indicate that notices of determination, with notice numbers L-013535218, L-013535219, L-013535220, L-013535221, L-013535222, L-013535223, L-013535224 and L-013535225 were sent to "OTERO-ALBERTO F, PO BOX 104 HALSEY LN, REMSENBURG, NY 11960-0104," by certified mail using control numbers P 911 205 118, P 911 205 119, P 911 205 120, P 911 205 121, P 911 205 122, P 911 205 123, P 911 205 124 and P 911 205 125. A U.S. postmark on each page of the CMR confirms that the notices of determination were sent on May 19, 1997.

A review of the notices of determination dated May 19, 1997 and mailed to petitioner on May 19, 1997 indicates that the documents bear assessment identification numbers of L-013535218, L-013535219, L-013535220, L-013535221, L-013535222, L-013535223, L-013535224 and L-013535225 and the certified control numbers P 911 205 118, P 911 205 119, P 911 205 120, P 911 205 121, P 911 205 122, P 911 205 123, P 911 205 124 and P 911 205 125. The foregoing numbers are identical to the assessment identification and certified control numbers that appear next to the entries for "OTERO-ALBERTO F" on the May 19, 1997 CMR.

Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavits were the normal and regular procedures of the CARTS Control Unit on May 16, 1995 and May 19, 1997.

8. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center. He supervises the entire mail processing staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS on the following day by a member of the Mail Processing Center staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

Mr. Baisley reviewed the copy of the CMR listing the pieces of certified mail delivered to the Colonie Center branch of the USPS by the Mail Processing Center staff on May 16, 1995. A review of the CMR indicates that a USPS employee signed or initialed pages 1, 2 and 37 of the CMR, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 399 pieces were delivered to the USPS.

Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit (copies of the May 16, 1995 CMR and notices of determination dated May 12, 1995), and his personal knowledge of the procedures of the Mail Processing Center, he was able to determine that an employee of the Mail Processing Center delivered four pieces of certified mail addressed to "OTERO-ALBERTO F, PO BOX 104 HALSEY LN, REMSENBURGH, NY 11960-0104" to the Colonie Center branch of the USPS in Albany, New York in sealed, postpaid windowed envelopes for delivery by certified mail. Mr. Baisley states that the name of Alberto F. Otero and the respective address, as set forth on the statutory notices, would have been displayed in the windows.

Based upon his review of the CMR, Mr. Baisley could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on May 16, 1995 for the records of the Division's CARTS Control Unit. He stated that the procedures in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and he also stated that these procedures were followed on May 16, 1995.

9. Mr. Baisley further reviewed the copy of the CMR listing the pieces of certified mail delivered to the Colonie Center branch of the USPS by the Mail Processing Center staff on May

19, 1997. A review of the CMR indicates that a USPS employee signed or initialed pages 1, 2 and 18 of the CMR, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 192 pieces were delivered to the USPS.

Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit (copies of the May 19, 1997 CMR and notices of determination dated May 19, 1997), and his personal knowledge of the procedures of the Mail Processing Center, he was able to determine that an employee of the Mail Processing Center delivered eight pieces of certified mail addressed to "OTERO-ALBERTO F, PO BOX 104 HALSEY LN, REMSENBURG, NY 11960-0104" to the Colonie Center branch of the USPS in Albany, New York in sealed, postpaid windowed envelopes for delivery by certified mail. Mr. Baisley states that the name of Alberto F. Otero and the respective address, as set forth on the statutory notices, would have been displayed in the windows. In addition, the Mail Processing Center also delivered eight pieces of certified mail addressed to "CYRIL BEZKOROWAJNY, 20 GIBSON ST, BAYSHORE, NY 11706" to the Colonie Center branch of the USPS in Albany, New York in sealed postpaid window envelopes for delivery by certified mail. The name of Cyril Bezkorowajny and his address, as set forth on the covering letter to the statutory notices, would have been displayed in the window of each envelope.

Based upon his review of the CMR, Mr. Baisley could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on May 19, 1997 for the records of the Division's CARTS Control Unit. He stated that the procedures in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business

when handling items to be sent by certified mail, and he also stated that these procedures were followed on May 19, 1997.

10. Leonard Finke is the Director in the Personal Income Tax Returns Processing Bureau in the New York State Department of Taxation and Finance and has been employed by the Department for 27 years.

As part of his regular duties, Mr. Finke oversees the analysis and testing of computer systems which process tax return information. These systems store information derived from various sources and generate printed documents which are sent to taxpayers as well as printouts of purged information.

After the taxpayer's information is captured from the taxpayer's return or application for an extension to file a return onto the Returns Processing Database, it is stored in a record format. The taxpayer's address represented on the printout is the information used to process the taxpayer's return or application for an extension to file.

Based on his review of the computer printout of the tax return of petitioner for the year 1994, Mr. Finke could determine that petitioner's address as listed on such return was PO Box 104-Halsey Ln, Remsenburg, NY 11960-0104. In addition, based on his review of the computer printout of petitioner's Application for Automatic Extension of Time to File for Individuals for the year 1996, Mr. Finke determined that the address on such application was PO Box 104-Halsey Ln, Remsenburg, NY 11960-0104.

10. The address appearing on petitioner's 1995 New York State Resident Income Tax Return, dated April 11, 1996, is "Halsey Lane P.O. Box 104, Remsenburg, NY 11960."

11. In its answer, the Division conceded that Notice of Determination L-013716810 has been canceled and Notice of Determination L-010344769 has been paid in full and closed in the Division's records. In addition, Notice of Determination L-013535217 has been canceled.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (*Id.*)

C. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991;

Matter of Katz, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz, supra*).

D. As noted in Conclusion of Law “C”, the required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and Mr. Baisley in support of its position that the notices of determination were issued to petitioner on May 16, 1995 and May 19, 1997.

The affidavits of Ms. Mahon and Mr. Baisley contain sufficient proof to establish the standard procedure of the Division for issuing notices of determination (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

Second, the Division established that the general issuance procedure was followed on May 16, 1995 and May 19, 1997 in the generation and mailing of petitioner’s notices of determination dated May 12, 1995 and May 19, 1997. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail records, show the total number of pieces received by the USPS on each occasion, and the postmarks on the certified mail records, in turn, show the dates of mailing as May 16, 1995 and May 19, 1997 (*see, Matter of Auto Parts Center*,

Tax Appeals Tribunal, February 9, 1995). It is observed that the certified mail records used by the Division contain most of the significant elements of Postal Service Form 3877, and serve the same purposes of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient. Finally, it is noted that the figures "399" on the last page of the May 16, 1995 CMR and "192" on the last page of the May 19, 1997 CMR, signifying the total number of pieces of mail involved, have been circled and a Postal Service employee has initialed or signed in the vicinity of the figures. As in *Matter of Roland (supra)*, the Division's affiant (here Mr. Baisley) states that the circling of these figures indicate that these were the number of pieces of mail received by the USPS on May 16, 1995 and May 19, 1997. In addition, and unlike the situation in *Roland*, the affiant here also states the basis of his knowledge for this proposition. That is, the Baisley affidavits state that the Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. Accordingly, consistent with the reasoning in *Roland*, the Division has met its burden of proof on the question of actual mailing in this case as to the May 16, 1995 and May 19, 1997 Notices of Determination.

Furthermore, The Division has established through the introduction into evidence of a computer printout of petitioner's 1994 personal income tax return, petitioner's 1995 personal income tax return and a computer printout of petitioner's 1996 application for an extension to file that it mailed the notices to petitioner on May 16, 1995 and May 19, 1997 at his last known address.

E. As noted in Conclusions of Law “A” and “B”, a Notice of Determination becomes an assessment unless the taxpayer requests a conciliation conference with BCMS or files a petition with the Division of Tax Appeals within 90 days after the notice is issued. The last day on which petitioner could have timely requested a conciliation conference with BCMS or filed a petition with the Division of Tax Appeals with reference to the notices dated May 12, 1995 and mailed on May 16, 1995 was August 14, 1995, and with reference to the notices dated May 19, 1997, the last day was August 17, 1997. The request for a Bureau of Conciliation and Mediation conference was filed on December 14, 1997. Unfortunately, this date is past the statutory 90-day period within which such a request may be made. Accordingly, the request was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner’s case as to the notices of determination mailed on May 16, 1995 and May 19, 1997.

F. Petitioner’s contention that Tax Law § 1138(a)(1) as applied in this case deprived him of his right to due process is rejected. Tax Law § 1138(a)(1) clearly provides sufficient procedural protections to satisfy constitutional due process requirements (*see, Matter of Banco*, Tax Appeals Tribunal, April 17, 1997; *see also, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 US 18, 110 L Ed 2d 17).

G. The petition of Alberto F. Otero is granted to the extent indicated in Finding of Fact “11”, but in all other respects is dismissed.

DATED: Troy, New York
January 13, 2000

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE